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No. 06-132

Supreme Court, U.S.
FILED
NOV 6 - 2006
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VANDERWERF, MICHAEL AND JERILYN WARD,

*Petitioners,*

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court**

## REPLY TO OPPOSITION BRIEF OF PRIVATE PARTY RESPONDENTS KEN WILLIAMS, *ET AL.*

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## ARGUMENT

In seeking to avoid addressing the issue of whether the court below properly applied this Court's decision in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), Respondents Ken Williams, et al., argue that *Weinberger* is simply inapplicable because in 2003 the Maine Legislature rejected a bill designed to remove 20-A M.R.S.A. § 2951(2). They seek to rely on statements made by legislators favoring rejection of the legislation as supplying new rationales for a policy first implemented in 1980 and codified in 1982. Petitioners maintain that reliance on rationales articulated in conjunction with rejected legislation cannot provide a rational basis for legislation passed more than two decades earlier. Neither Respondents nor the courts below have cited to *any* case that properly supports their position.

Petitioners have argued that § 2951(2) violates their Equal Protection, Free Exercise, and Establishment Clause rights by discriminating against families in tuitioning towns who send their children to otherwise eligible religious schools. Prior to a 1980 Maine Attorney General's Opinion, parents in Petitioners' situation received the benefit of tuition payments made to participating religious schools on their children's behalf.[1] The Attorney General concluded (erroneously) that it violated the Establishment Clause for the tuitioning school districts to continue making tuition payments to religious schools. The Commissioner of Education implemented the Opinion for the next school year, 1980-81.

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[1] In fact, parents from Petitioners' school districts benefited from tuition payments made to the exact same two schools to which Petitioners send their children.

The Chairman of the Maine Legislature's Joint Committee on Education, Senator Howard Trotzky of Bangor, had requested the Opinion while his Committee was working on a complete revision of Maine's education laws. Senator Trotzky introduced his Committee's revision in 1982, and it became effective in 1983. Senator Trotzky and other members of the relevant committees assured their colleagues that no substantive changes to existing law were effected by the recodification.[2] Section 2951(2) plainly incorporated the conclusion of the Attorney General's Opinion that the current law had to be read as excluding religious schools, by making explicit a requirement that only nonsectarian schools could receive tuition payments. The only reasonable conclusion one can reach from this history and the language of § 2951(2)[3] is that compliance with the Establishment Clause was *the* reason for the exclusion of religious schools from the program.

Respondents argue that this language and prior history should be ignored and that attention must be focused exclusively on the rationales asserted by individual members of the 2003 legislature who voted to reject corrective legislation. They gloss over relevant aspects of the intervening history of § 2951(2), which place the 2003 legislation in a far different light. They also focus exclusively on the effect of this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), while ignoring the effect of

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[2] See Petitioners' Reply to the State's Brief in Opposition to Certiorari at 6-7, for a fuller discussion of this point.

[3] Section 2951(2) requires that participating schools be "nonsectarian in accordance with the First Amendment of the United States Constitution." The whole text of § 2951 is set out in the Petition for Certiorari ("Pet. Cert.") at App. 64-65.

this Court's earlier decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The decision below is not the Maine Supreme Judicial Court's ("SJC") first consideration of § 2951(2). In *Bagley v. Raymond School Dep't*, 728 A.2d 127, 138 (Me.), *cert. denied*, 528 U.S. 947 (1999), a similar group of parents challenged that section on similar grounds. In the course of rejecting those claims, the SJC opined that § 2951(2) would not survive even rational basis review if it were enacted pursuant to an erroneous interpretation of the Establishment Clause, the only justification the State had advanced for excluding religious schools. The SJC, however, then erred in concluding that § 2951(2) reflected a correct interpretation of the Establishment Clause, *i.e.*, that the Clause prohibited paying tuition for children to attend religious schools chosen by their parents under a religiously-neutral program.

Three years later in 2002, in *Zelman v. Simmons-Harris*, this Court held that religious schools could participate in religiously-neutral school choice programs where it was the free and independent choices of the parents that determined which schools their children attended. Maine parents from tuitioning towns then requested that their districts reinstate the prior practice of paying tuition to religious schools, leading Maine's Commissioner of Education to ask the Attorney General what he should do. In a cursory reply, the Attorney General instructed the Commissioner that until the legislature or a court mandated otherwise the Education Department and school districts had to abide by § 2951(2).[4] In addition to

[4] The reply is found in the Pet. Cert. at App. 66-67.

referring to "significant differences" between the Cleveland program upheld in *Zelman* and Maine's program,[5] he stated that the fundamental difference between *Zelman* and any challenge to § 2951(2) was that while *Zelman* held states are allowed to use vouchers, the issue in Maine was "whether Maine is *required* to fund sectarian education." Despite having noted that the SJC had recently upheld § 2951(2) in *Bagley*, he failed to mention the crucial fact that *Bagley* also said that if the Establishment Clause did not *require* exclusion of religious schools then § 2951(2) lacked a rational basis and violated the Equal Protection Clause.

Frustrated by the refusal of their districts to pay tuition for their children based upon the Attorney General's flawed reply, the Petitioners filed suit in state court against their school districts and the Commissioner.[6] Some months later, and not at the instigation of Petitioners, legislation was introduced to repeal § 2951(2). This legislation failed to pass, with various legislators giving a wide array of reasons for opposing it. Among these reasons were those given in the Attorney General's reply from the year before, including all of the specious ways he sought to distinguish *Zelman*. Several other less wholesome reasons for maintaining the discrimination

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[5] He included "the structure of the school system, the structure of the tuition program, the options available, and the level of payments." Pet. Cert. App. 67. None of the Respondents nor the SJC has ever explained how any of these things legally distinguish the two programs. Petitioners have maintained without contradiction that in fact the Maine program would be perfectly constitutional were parents again allowed to receive the benefit of tuition payments for their children's education.

[6] Shortly thereafter, similarly-situated parents filed a lawsuit in federal court, which resulted in *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004).

were also given, including the costs that would be entailed from treating parents like petitioners the same as other parents in the tuitioning districts,[7] and that all religious groups and schools would have to be treated equally.[8] A number of opponents simply misunderstood the legislation as support for a voucher system, failing to recognize that all the legislation tried to do was allow parents like Petitioners to participate on an equal basis in an *existing* voucher system.[9]

Thanks to the Attorney General's reply, no doubt many legislators agreed with Representative Mills, who stated: "Our system is not constitutionally broke as it currently stands and it is not necessary to fix something that is not broken."[10] His position was seconded by Representative Millett, who actually explained to the House that he was on the committee that added § 2951(2) "in strict concurrence with the Attorney General's recommendations," that it had been upheld in subsequent litigation, and that it needed no change.[11] Obviously, these legislators

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[7] Transcript of House Debate on LD 182 at H-584 (May 13, 2003) (remarks of Rep. Cummings, chairman of the Education Committee) ("Let me start with the most basic [reason]: you can't afford it."); *id.* at H-588 (remarks of Rep. Gagne-Friel) ("We can't afford it"), Joint Exhibit 101 from the App. Below.

[8] *Id.* at H-585 (remarks of Rep. Davis) ("If you open this up, be prepared to open it up thoroughly, because some of those groups, I am sure, will be forming their own schools").

[9] *Id.* at H-584 (remarks of Rep. Cummings) ("we have to believe that children are better supported by public schools with public money"); *id.* (remarks of Rep. Sullivan) ("We need to set policy and say that we support our public schools with taxpayer's money. We don't support private schools, parochial private schools").

[10] *Id.* at H-585.

[11] *Id.* at H-589.

were not intending to supply new rationales for legislation that they did not believe needed any.

When legislation has been successfully passed, in trying to glean the rationale behind it a court can look to a wide variety of sources. The language of the enactment, the structure of the program, the committee reports, and the statements of the sponsors are all fair game. But statements of opponents of legislation are not accorded weight because they have every reason to distort the meaning and purposes of the proposal in order to reject it. What the Respondents urge here is unprecedented: that statements, standing alone, of opponents of legislation that would change an existing statute can supply a new rational basis for the original statute in the course of opposing the change to it. There is no new language to parse, no committee reports, no statements of sponsors, only the bare statements of legislators with a wide array of reasons for opposing a bill.

The sole case relied on by Respondents to support this unprecedented position is *Bob Jones University v. United States*, 461 U.S. 574 (1983), relied on by the trial court below.[12] *Bob Jones* found significance in Congress' failure to enact legislation to overturn a controversial interpretation of the Internal Revenue Code by the IRS and upheld the interpretation. Stating that "ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation," 461 U.S. at 600 (citing cases), this Court found the nonaction significant because "during the past 12 years there have been no fewer than 13 bills introduced to overturn

[12] Brief in Opposition at 4-5 n.2.

the IRS interpretation," *and* because "[t]he evidence of congressional approval goes well beyond the failure of Congress to act on legislative proposals." *Id.* at 601. In particular, this Court emphasized that "Congress affirmatively manifested its acquiescence in the IRS interpretation" when it enacted a related provision of the Internal Revenue Code and favorably referenced a court case upholding the same interpretation the IRS gave the original provision. *Id.*

*Bob Jones* involved whether congressional inaction could demonstrate acquiescence in an *interpretation* given by the agency Congress charged with interpreting the statute it had passed, where the indicia of acquiescence were overwhelming. Neither factor is present in the case below. The circumstances in *Bob Jones* are a far cry from the use to which Respondents put *Bob Jones*, which is to allow statements made in rejecting a single effort to repeal a statute to supply new *rationales* for upholding it.

The bottom line here is simple. The plain language of § 2951(2) continues to reflect its original purpose, compliance with a flawed interpretation of the First Amendment's Establishment Clause. Nothing done by the 2003 Legislature changed that language and its inherent religious discrimination. It continues to prohibit payment of tuition on behalf of any student attending any school that is not "nonsectarian in accordance with the First Amendment of the United States Constitution," despite the fact the First Amendment does not actually require that schools be nonsectarian in order for their students to benefit from religiously-neutral voucher programs like Maine's tuitioning program. The constitutionality of § 2951(2) must turn on the sole motivation for its enactment, compliance with the Establishment Clause.

Respondents have sought to avoid the problem they face under *Weinberger* by using *Bob Jones* to refocus this Court's attention on the red herring of the 2003 legislation. This case does in fact fall within the narrow confines of *Weinberger* because the rationale for creating § 2951(2) is actually known, a mistaken interpretation of the Establishment Clause. Such an interpretation cannot satisfy even the rational basis test.[13]

## CONCLUSION

For the reasons discussed above and in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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[13] Petitioners do not concede that under *Locke v. Davey* the appropriate test is rational basis scrutiny, only that that question need not be reached if it is recognized that § 2951(2) cannot meet either level of scrutiny, rational basis or strict scrutiny. Petitioners have shown in their Petition for Certiorari and Reply to the State Defendants' Brief Opposing Certiorari that the decision below misapplies *Locke* and will not repeat those arguments here.